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No. 93-1783

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Director, Office of Workers' Compensation Programs of the United States Department of Labor, has standing to petition the Courts of Appeals for review of a decision of the Department of Labor's Benefits Review Board, regardless of whether one of the Director's legally cognizable interests has been injured by the Board's decision.

PARTIES

The Petitioner is the Director, Office of Workers' Compensation Programs of the United States Department of Labor ("the Director"). The Respondent is the Newport News Shipbuilding and Dry Dock Company. The Claimant, Jackie Harcum, expressly declined to participate in the Director's appeal of the Benefits Review Board's decision to the United States Court of Appeals for the Fourth Circuit and he is not participating in this proceeding.

CORPORATE AFFILIATIONS

The Newport News Shipbuilding and Dry Dock Company is a wholly owned subsidiary of Tenneco, Incorporated.

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BRIEF FOR THE RESPONDENT

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution is reprinted in the Appendix to this Brief. Pertinent provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 921(b), 921(c), 921(d), 921a, 939(a), 939(c)) are reprinted in the Appendix to the Petition for a Writ of Certiorari (Pet. App. at 63a-66a). Additional pertinent statutory provisions (33 U.S.C. §§ 902(1),(6)) are reprinted in the Appendix to this Brief.

Pertinent provisions of the Department of Labor regulations (20 C.F.R. §§ 701.201, 701.202, 702.333, 801.102, 802.410) are reprinted at Pet. App. at 67a-68a.

STATEMENT OF THE CASE

A. The Workers' Compensation Framework

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("the Longshore Act" or "the Act"). The Act is a workers' compensation statute. As such, it provides compensation and medical treatment for covered employees who sustain injuries "arising out of and in the course of employment." 33 U.S.C. §§ 902(2), (3). Like all workers' compensation statutes, the Longshore Act is a compromise. It imposes strict liability upon covered employers for work-related injuries. In return, the Act establishes "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980).

Generally, the employee receives two-thirds of his lost wages or a scheduled award, and medical treatment. Thus, the Act is not social welfare insurance. Rather, as this Court has noted, the Longshore Act is a compromise between the competing interests of employers and claimants: "It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and

their employers." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. at 282. (footnote omitted)

Congress authorized the Secretary of Labor ("the Secretary") to administer the Act and to promulgate the regulations necessary to carry out that delegation of authority, in much the same way any agency is empowered to administer the programs entrusted to it. *See* 33 U.S.C. § 939(a). Like most other agencies, for example, the adjudication of claims is subject to the Administrative Procedure Act. 33 U.S.C. § 919(c). Congress also specifically delineated the responsibilities encompassed within the Secretary's administrative duties. The Secretary is authorized to provide legal information and assistance to injured employees in processing their claims for benefits. He is also empowered to provide information and to assist employees in obtaining medical and vocational rehabilitation services. 33 U.S.C. § 939(c). Congress authorized the Secretary to promulgate and enforce rules and regulations to protect the safety of covered employees, 33 U.S.C. § 941, to supervise the medical care of injured employees, 33 U.S.C. § 907, and to establish a procedure for processing compensation claims, 33 U.S.C. § 919. The Act also imposes on the Secretary the duty to protect the interests of the Special Fund established to partially relieve employers from liability for permanent disabilities which are contributed to by pre-existing permanent disabilities. *See* 33 U.S.C. §§ 908(f), 944; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Langley)*, 676 F.2d 110, 113-14 (4th Cir. 1982).

The Secretary delegated his administrative duties to the Director, Office of Workers' Compensation Programs

("the Director").[1] *See* 20 C.F.R. § 701.201. Congress also delegated a few narrowly drawn enforcement responsibilities to the Secretary, and thus, to the Director. 33 U.S.C. §§ 921(d), 941(b)(5), 944(d)(1), (3).

The Director's duties under the Act, however, are almost entirely ministerial. The Act is a workers' compensation statute, and the vast majority of claims for benefits under the Act are paid by employers or insurers voluntarily and in a timely manner.[2] The Act requires an employer that contests an employee's right to compensation to affirmatively controvert the claim within 14 days after being notified of the injury on a form prescribed by the Director. 33 U.S.C. § 914(d); 20 C.F.R. § 702.251. Upon receipt of a notice of controversion, the District Director initiates the adjudication mechanism. 20 C.F.R. § 702.252.

The first step is an informal conference scheduled and convened by the District Director. 20 C.F.R. §§ 702.301, 702.311-313. The District Director may make a recommendation for resolution of the claim based on information presented at the conference. The recommendation is not, however, binding on either the claimant or

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[1] These duties are actually carried out by District Directors, formerly called Deputy Commissioners, appointed by the Secretary. 33 U.S.C. § 904(a); 20 C.F.R. §§ 701.301(a)(7), 702.105.

[2] In *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 637 (1983), this Court observed that a 1982 report by the Comptroller General of the United States stated that 95% of all lost-time injuries are compensated immediately without referral of the claim to an Administrative Law Judge.

the employer. 20 C.F.R. § 702.316. The informal conference is merely an attempt to resolve any outstanding issues without resort to a formal hearing.

If the claimant and employer reach agreement on all issues, the District Director may enter a compensation order pursuant to that agreement. 20 C.F.R. § 702.315. The District Director does not, however, have authority to enter a compensation order absent the private parties' agreement. If agreement on all contested issues is not achieved, either the claimant or the employer may request a formal hearing. 20 C.F.R. § 702.316. The District Director must transfer the claim to the Department of Labor's Office of Administrative Law Judges upon receipt of a request for a hearing. 33 U.S.C. § 919(c); 20 C.F.R. § 702.317. The District Director has no discretion to do otherwise. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994).

Contested claims are heard by Administrative Law Judges from the Department of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 *et seq.* ("APA"). 33 U.S.C. § 919(d); 20 C.F.R. 702.332. The regulations provide that the claimant and employer or workers' compensation insurance carrier are necessary parties. 20 C.F.R. § 702.333(a). The regulations, but not the statute, provide that the Solicitor of Labor may appear and participate before the Administrative Law Judge as an interested party on behalf of the Director. 20 C.F.R. § 702.333(b). The Director is not, however, a necessary party.

The decisions of Administrative Law Judges may be appealed to the Department of Labor's Benefits Review

Board ("the Board"). The Longshore Act states that any party in interest may appeal substantial questions of law or fact to the Board. 33 U.S.C. § 921(b)(3). Similarly, the regulation governing Board proceedings defines the term "party in interest" as including "the Secretary [of Labor] or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. § 801.2(10). Neither the statutory language nor the implementing regulations require that a party be adversely affected or aggrieved in order to prosecute an appeal before the Board. Status as a party in interest is sufficient.

The authority to seek review of a Board order before the Courts of Appeals is more limited. Section 21(c) of the Act authorizes only those persons "adversely affected or aggrieved by a final order of the Board" to obtain review in the Courts of Appeals. 33 U.S.C. § 921(c). The term "person" is defined as an "individual, partnership, corporation, or association." 33 U.S.C. § 902(1). While the term "Secretary" is defined in the Act, neither the Secretary nor the Director is by name included in the definition of a "person." *See* 33 U.S.C. § 902(1), (6). The Secretary's regulations designate the Director as the Secretary's representative in all review proceedings before the Courts of Appeals. 20 C.F.R. § 802.410. Nevertheless, the Director's standing to seek review of a Board decision is derivative of the Secretary's standing. The Act limits standing to only those *persons* adversely affected or aggrieved by a Board order, and the Secretary is not named in the definition of the term "person."

The Longshore Act clearly establishes a framework for resolving contested claims between private parties

(the claimant and the employer or insurer). The Act even provides for payment of successful claimants' attorney's fee and expenses by the employer or insurance carrier.[3] 33 U.S.C. § 928. The Act does not, however, authorize the Director to seek review of decisions of the Board in the Courts of Appeals on behalf of either private party in a contested workers' compensation claim.

A review of the legislative development of the Longshore Act is helpful in understanding why the Director's appeal of a Benefits Review Board decision was never envisioned by Congress, at least where the Secretary has no injury in fact as required by Article III. When the Longshore Act was originally enacted in 1927, the Deputy Commissioners (now called District Directors) served both as administrators and as claims adjudicators. The Deputy Commissioners decided contested claims, and the claimant or employer could appeal by seeking an injunction in the appropriate United States District Court against the Deputy Commissioner. *See* former Section

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[3] If a covered employee utilizes an attorney to prosecute a controverted claim, and the employee is successful in obtaining benefits, the employer or insurance carrier is responsible for payment of reasonable attorneys fees directly to the claimant's attorney. 33 U.S.C. § 928(e); 20 C.F.R. § 702.134. The employer or carrier is also responsible for payment of the claimant's attorney's costs, including expert witness fees. 33 U.S.C. § 928 (d); 20 C.F.R. § 702.135. An attorney seeking a fee award must file a fee petition with the District Director, Administrative Law Judge or Court before whom the services are performed. 33 U.S.C. § 928; 20 C.F.R. § 702.132. Acceptance of a fee which has not been approved is a crime punishable by imprisonment for not more than one year and a $1000 fine. 33 U.S.C. § 928(e); 20 C.F.R. § 702.133.

21(b), 44 Stat. 1436 (1927). Since the Deputy Commissioner was the defendant in the federal action, section 21a of the Longshore Act allowed United States Attorneys to defend the Deputy Commissioner in such proceedings. *See* former Section 21(a), 45 Stat. 490 (1928).

In considering the 1972 Amendments, Congress found fault with this scheme in which the Deputy Commissioners were both administrators and adjudicators. Thus, Congress split off the adjudicatory function, adopting the Administrative Procedure Act and utilizing hearing examiners (now called Administrative Law Judges), with an appeal to the Benefits Review Board. 33 U.S.C. §§ 919, 921(b). Congress did not intend the administrative function to be involved in the adjudication process, and noted that the pre-1972 scheme:

> *[s]uffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings.* Moreover, with the new responsibilities that will devolve upon the Secretary with the passage of this bill it will be extremely important to have full time able *administrators who will not also have to wear the dual hat of being hearing officers* for purposes of the disputes brought under this statute.

H. Rep. No. 92-1441, 92nd Congress, 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708 (emphasis added).[4]

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[4] The Petitioner relies heavily on a 1977 Senate Committee Report concerning Title IV of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 901 *et seq.* ("BLBA"). Petitioner's Brief at 29. Even putting aside the fact the comment was made 5 years after the 1972 Amendments to the Longshore Act were passed, in that Report Congress recognized the need for a

Thus, prior to 1972, the Deputy Commissioner was a defendant in the federal court review action. There was, therefore, no such thing as an appeal by the Director. The Secretary of Labor would not have sought an injunction against his own Deputy Commissioner. The 1972 Amendments merely replaced Deputy Commissioners with Administrative Law Judges and the Benefits Review Board. Congress did not envision an additional discrete role for the Secretary of Labor, apart from his own Board, in the adjudication process. To the contrary, the only role contemplated for the Secretary was for him to request a remand from the Benefits Review Board for further fact finding under section 21(b)(4) of the Act. 33 U.S.C. § 921(b)(4). Section 21a was also amended to allow the Secretary to appoint attorneys to represent him, the Deputy Commissioners or the Benefits Review Board in Court, in an enforcement proceeding, instead of United States Attorneys. *See* 33 U.S.C. § 921a.

After the 1972 Amendments, the Secretary of Labor created the Director, Office of Workers' Compensation Programs, 20 C.F.R. § 701.201. For reasons not altogether clear, the Director, a delegate of the Secretary of Labor, started to appeal decisions of the Benefits Review Board, another delegate of the Secretary of Labor.

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legislative standing provision and enacted one for the BLBA. 30 U.S.C. § 932(k). There is no such provision in the Longshore Act. Indeed, under the BLBA, the Secretary, usually either defends against the claim, or is involved in determining the responsible operator/employer, and then seeks reimbursement from the employer via a trust fund. *See* Section I.E *infra*.

B. The Pending Workers' Compensation Claim

The Claimant, Jackie Harcum, was employed by Respondent Newport News Shipbuilding and Dry Dock Company ("Newport News Shipbuilding" or "the Shipyard") when he sustained a lumbar spine injury on October 21, 1984 (Pet. App. at 38a). Following surgery, Newport News Shipbuilding provided Harcum a light duty job in a shop during his convalescence. When Harcum's injury reached maximum medical improvement, permanent medical work restrictions were imposed and he returned to work on board ships (Pet. App. at 41a-42a). Harcum continued to complain of back pain after returning to shipboard work, and additional work restrictions were imposed. Newport News Shipbuilding had no work available within the more severe work restrictions, and thus, Harcum was released from employment with the Shipyard on May 6, 1988 (Pet. App. at 42a-43a).

When Harcum was released from employment, he was advised that the Shipyard would notify him if a suitable permanent light duty job later became available. Newport News Shipbuilding did not, however, promise Harcum an alternate position, nor did it suggest that he need not look for employment in the open labor market (Pet. App. at 43a). No permanent light duty position at Newport News Shipbuilding became available, even after a renewed search for such a job for Harcum (Pet. App. at 44a). Harcum did not look for another job until early in 1989, when a vocational rehabilitation consultant retained by Newport News Shipbuilding, Frances C. DeMark, located a job for him with another employer. DeMark

arranged an interview, and shortly thereafter on February 16, 1989, Harcum was hired for the position DeMark located (Pet. App. at 43a-47a).[5]

A hearing was held before an Administrative Law Judge on October 20, 1989. The issues were whether Harcum was entitled to temporary partial disability compensation under 33 U.S.C. § 908(e) because he was unable to work overtime during his last period of employment at the Shipyard; whether Harcum was entitled to temporary total disability compensation pursuant to 33 U.S.C. § 908(b) for allegedly being given work more strenuous than his restrictions when he returned to shipboard work in 1988 with Newport News Shipbuilding; whether Harcum was totally or partially disabled under 33 U.S.C. § 908(c)(21) during the time after his release from employment at the Shipyard on May 6, 1988 and February 16, 1989 when he accepted another job in the open labor market; and whether Newport News Shipbuilding is entitled to limit its liability for Harcum's permanent

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[5] The Longshore Act does not place any obligation on an employer to help a claimant find work, nor to provide him with such rehabilitation assistance. Rather, a claimant's residual earning capacity is based on what he could earn if he diligently looked for work. Employers generally prove a claimant's residual earning capacity by hiring a vocational rehabilitation counselor as an expert witness to perform a labor market survey to identify available jobs and thus prove wage earning capacity. While employers are not obligated in any manner to help the worker find a job, some employers, like Newport News Shipbuilding, voluntarily go a step further and help injured claimants find work in the open labor market. *See* 33 U.S.C. § 908(h); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988).

partial disability compensation pursuant to the second injury fund provision in section 8(f) of the Act, 33 U.S.C. § 908(f).[6]

The Administrative Law Judge issued his decision on March 28, 1990. The Judge found that Harcum was entitled to a temporary partial disability award for lost overtime while working in a shop (Pet. App. at 55a) and a temporary total disability award for being worked outside of his restrictions during the period he returned to shipboard work, even though Harcum was paid his regular wage and worked a substantial amount of overtime during that time period (Pet. App. at 57a-59a). The Administrative Law Judge also found that Harcum was only partially disabled after his release from Newport News Shipbuilding on May 6, 1988 and before February 16, 1989 when he accepted the job in the open market located by the vocational rehabilitation consultant retained by the Shipyard (Pet. App. at 56a-57a). Newport News Shipbuilding was also awarded relief from the Special Fund pursuant to section 8(f) (Pet. App. at 59a-61a).

In reaching his decision that Harcum was only partially disabled between May 6, 1988 and February 16, 1989, the Administrative Law Judge relied in part on *Stevens v. Lockheed Shipbuilding Co.*, 22 B.R.B.S. 155, 157-159 (1989), *rev'd in pert. part sub nom., Stevens v.*

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[6] When an employer is awarded relief pursuant to 33 U.S.C. § 908(f), its liability for a claimant's compensation for a permanent disability is limited to 104 weeks. At the conclusion of the 104 week period, liability for the claimant's compensation is transferred to the Special Fund.

Director, OWCP, 909 F.2d 1256 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), which held that a claimant's residual wage earning capacity relates back to the date his injury reaches maximum medical improvement (Pet. App. at 56a-57a). The Director, who had not appeared at the hearing before the Administrative Law Judge, appealed (Pet. App. at 29a, 33a).[7] Before the Board, the Director argued that the Administrative Law Judge erred in his determination that Harcum's residual wage-earning capacity relates back to the date of maximum medical improvement, and thus, that he was only partially disabled between May 6, 1988 and February 16, 1989. The Director also argued that Newport News Shipbuilding was not entitled to limit its liability pursuant to section 8(f).

On May 28, 1992, the Board affirmed the Administrative Law Judge's decision and order.[8] During the pendency of the Director's appeal, *Stevens* was reversed by the Ninth Circuit, which held employers must prove when the suitable alternative employment was available. Nevertheless, the Board affirmed the Administrative Law Judge's finding that Harcum was not totally disabled after he left Newport News Shipbuilding. The Board ruled that vocational rehabilitation counselor DeMark's

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[7] The Director did file a post-hearing brief with the Administrative Law Judge. However, the only issue addressed in the Director's brief was Newport News Shipbuilding's claim for section 8(f) relief (Director's Post-Hearing Brief at 2).

[8] The Board decision reprinted in Appendix C to the Director's Petition for a Writ of Certiorari reflects the incorrect date of May 28, 1990 (Pet. App. at 27a-36a). The Board's decision was issued on May 28, 1992.

hearing testimony identified specific appropriate job opportunities available to Harcum during the relevant period, and thus demonstrated that Harcum was employable if he had looked for work. The Board also ruled that Newport News Shipbuilding's voluntary attempt to locate a light duty job within its facility did not impact on the evidence of available alternate employment outside of the Shipyard in the open labor market. Thus, under *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988), Harcum was not totally disabled. The Board also affirmed the Administrative Law Judge's finding that Newport News Shipbuilding's liability for Harcum's permanent partial disability compensation is limited to 104 weeks of compensation under section 8(f).

The Director then sought review of the Board's decision in the United States Court of Appeals for the Fourth Circuit pursuant to 33 U.S.C. § 921(c). Harcum did not participate in the review proceeding, and the Director did not include Harcum in the caption of her petition for review. On September 17, 1992, the Director moved to amend the caption to add Harcum as a respondent (Director's Motion To Amend Caption). In response to an inquiry from the Court of Appeals, on October 1, 1992, Harcum expressly declined to participate in the review proceeding.[9] His counsel stated that "[t]he director appealed the case and may pursue the case as the director chooses. Claimant has not appealed." (Attachments A and B to Respondent's Answer to Petitioner's Petition for Rehearing). The Director then moved to withdraw her

[9] Harcum's counsel's letter is incorrectly dated October 1, 1991, instead of 1992.

motion to amend the caption (Director's Motion to Withdraw Motion to Amend Caption). The Director's motion to withdraw was mailed on October 5, 1992, but on October 6, 1992, the Court of Appeals granted the Director's motion and amended the caption to show Harcum as the claimant in the proceedings below (October 6, 1992 Order).

The clerk of the Court of Appeals wrote counsel for the Director and Newport News Shipbuilding on October 7, 1992. The Court's letter/order stated that the Director's motion to withdraw was not filed until October 7, 1992, the day after the Court granted the Director's motion to amend the caption. In a display of apparent frustration with the Director, the Court explicitly stated that "Harcum is not a party to this case. There will be no action taken on the motion to withdraw" (October 7, 1992 Letter/Order).

Before the Court of Appeals, the Director sought review of the Board's decision affirming Newport News Shipbuilding's award of section 8(f) relief. In addition, the Director asserted that the Board exceeded its authority by affirming the Administrative Law Judge's finding that Harcum was only partially disabled between May 6, 1988 and February 16, 1989 on different grounds from those relied on by the Administrative Law Judge. The Director also argued that because of Newport News Shipbuilding's attempts to locate a light duty job within its

facility, Harcum was somehow relieved from the obligation of looking for work.[10]

The Fourth Circuit issued its decision on October 29, 1993, and sua sponte, the Court first considered whether the Director had standing to seek review of the Board's order. The Court noted that 33 U.S.C. § 921(c) codifies the case or controversy requirement of Article III of the Constitution. The Court also noted that under 33 U.S.C. § 921(b), any party in interest may appeal an Administrative Law Judge's decision to the Board. However, the Act only authorizes persons adversely affected or aggrieved by a Board order to obtain review in the Courts of Appeals (Pet. App. at 9a). Thus, the Court examined whether the Director was adversely affected or aggrieved by the Board's order.

The Court applied the reasoning of the Fifth Circuit in *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377 (5th

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[10] Under the Act, if no work is available within the employee's medical restrictions, the employee is *prima facie* totally disabled. The employer must then prove that jobs within the claimant's capabilities are realistically available if the employee diligently sought employment. *Trans-State Dredging v. BRB*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp, v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir.), *cert denied*, 479 U.S. 826 (1986). An employer meets its burden of proof if it shows the actual availability of jobs. An employer is not required to offer the claimant a light duty job at its facility or to obtain a job offer for him. Rather, the employer need only show that there are available job openings in the labor market which the claimant is qualified for and which he could obtain if he diligently looked for work. *Trans-State Dredging*, 731 F. 2d at 201, *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

Cir. 1978). In *Donzi Marine*, the Court concluded that the Act delegates four types of responsibilities to the Director which may be affected by a Board order: (1) the performance of a variety of general administrative and supervisory tasks; (2) the provision of assistance to injured employees covered by the Act in processing their claims; (3) the promulgation and enforcement of safety rules and regulations; and (4) the administration and protection of the assets of the Special Fund established by 33 U.S.C. § 944 (Pet. App. at 10a).

The Court then held that none of these four responsibilities was adversely affected by the Board's ruling that Harcum was only partially disabled between May 6, 1988 and February 16, 1989. Relying on *Donzi Marine*, as well as its own decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982),[11] the Fourth Circuit rejected the notion that the Director's administrative interests are adversely affected or aggrieved simply because the Board disagreed with the Director's position regarding a specific claim for workers' compensation benefits. The Court determined that the Board's decision with respect to Harcum's partial disability did not adversely affect any of the specific responsibilities delegated to the Director by Congress or the assets of the Special Fund. Accordingly, the Fourth Circuit held that the Director did not have standing to seek

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[11] The Fourth Circuit also relied on its decision in *I.T.O. Corp. v. BRB*, 563 F.2d 646, 648 (4th Cir. 1977), *reinstating in pertinent part*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977). (Pet. App. at 12a n.1).

review of this aspect of the Board's decision (Pet. App. at 13a-14a).[12]

SUMMARY OF THE ARGUMENT

This Court's own precedents are clear that under Article III of the Constitution, a party can have standing to challenge a decision only if that party suffers an injury in fact. Section 21(c) of the Longshore Act adopts this standard by allowing only a "person adversely affected or aggrieved" to obtain review of a Board decision. The claim at issue in this case involves a dispute over how much compensation an employer owes a claimant. No administrative duties or functions of the Director, Office of Workers' Compensation Program are affected by the Board's ruling. Thus, on its face, the Board's decision does not involve an injury to the Director. She does not, therefore, have standing under either section 21(c) of the Act or Article III.

[12] The Administrative Law Judge found that Newport News Shipbuilding was entitled to limit its liability under section 8(f) and the Board affirmed this determination. Since one of the Director's delegated duties is to administer and to protect the assets of the Special Fund, the Court of Appeals concluded that the Director could obtain review of this aspect of Board's decision. The Fourth Circuit vacated the award of second injury fund relief to Newport News Shipbuilding and remanded that aspect of the case for further consideration in conformity with its interpretation of section 8(f) (Pet. App. at 14a-24a). Neither the Director nor Newport News Shipbuilding sought review of that portion of the Fourth Circuit's decision.

The Director seeks to avoid this result by arguing that her administrative duties under the Longshore Act give her an interest in every compensation decision. Indeed, the Director argues that her job is to maximize every claimant's award, apparently assuming the role not of an administrator, but as an advocate for claimants. Nowhere in the Longshore Act, however, is the Director named as a claimants' advocate. To the contrary, in the 1972 Amendments to the Act, Congress separated the administrative function (given to Deputy Commissioners, now called District Directors, who now report to the Director) from the claims adjudication function (given to hearing examiners – now called Administrative Law Judges and the Benefits Review Board). The statutory scheme also explicitly adopted the Administrative Procedure Act, and there is no stated role for the Director to act as an advocate for claimants. Indeed, the notion of an administrator of a workers' compensation system advocating the position of either a claimant or employer defies the neutral adjudication program Congress intended by the 1972 Amendments, and which fundamental fairness requires. Moreover, as demonstrated by the Director switching sides in at least two cases decided by this Court, there are significant practical and conflict of interest problems in allowing standing to a party whose interest is merely "administrative." For example, if the Director seeks to maximize a claimant's benefits, what will she do if the Special Fund, whose assets the Director is obligated to protect, is paying those benefits pursuant to section 8(f) of the Act?

Even if the Director were to show an injury in fact, she faces two additional obstacles to standing. First, she

must show causation between the injury and the opposing party. Since the Benefits Review Board, a delegate of the Secretary of Labor, issued the decision the Director complains of, and the Director is also a delegate of the Secretary of Labor, the Director cannot show causation attributable to the opposing party (the employer) required for Article III for standing. Second, even if Article III did allow the Director standing, section 21(c) of the Longshore Act on its face does not include the Director within its definition of a "person" who can obtain review of a Board decision.

While standing has been granted in disputes between separate agencies of the Executive Branch, this Court has never allowed part of one unitary agency to sue another part of the same agency. Indeed, this Court has never held that a mere administrative interest, without an injury in fact, is enough for standing. There is no need to do so in this case, as it is clear Congress never intended such a result when it enacted section 21(c) of the Act. To the contrary, Congress explicitly stated its desire to separate out administration from the adjudication of claims, and the Benefits Review Board alone is the Department of Labor claims adjudicator.

ARGUMENT

I. THE DIRECTOR DOES NOT HAVE STANDING TO OBTAIN REVIEW OF A BOARD DECISION WHERE SHE IS NOT ADVERSELY AFFECTED OR AGGRIEVED BY THE BOARD'S ORDER

A. Only Those Persons Who Have Suffered An Injury In Fact To A Legally-Protected Interest Have Standing To Invoke The Jurisdiction Of Federal Courts

The jurisdiction of federal courts is limited to "Cases" and "Controversies" by Article III of the Constitution of the United States. U.S. Const., Art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992). The question of whether a party has standing involves both constitutional and prudential limitations on the exercise of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

The standing doctrine focuses on the party seeking to invoke federal jurisdiction and not on the issues that party wishes to have adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). At a minimum, the party invoking federal jurisdiction must establish the existence of three elements in order to satisfy the constitutional standing requirement: (1) a concrete and particularized injury in fact to a legally-protected interest of the person asserting standing, (2) the injury complained of must be attributable to the challenged action of the defendant (or in this case respondent) and (3) it must be likely that the injury will

be redressed by a favorable decision of the federal court. *See Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2136.[13]

Congress may extend standing to those who would otherwise be unable to invoke federal jurisdiction by prudential standing rules, subject to Article III. *Warth v. Seldin*, 422 U.S. at 501. Congress may not, however, abrogate the minimum requirements for Article III standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). The party asserting standing must show that he himself has sustained an injury in fact. *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Moreover, even if a party has statutory standing, that party must still establish that he has Article III standing. He must show the existence of a justiciable controversy. *See Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 304 (1983).

The dispute before this Court involves an issue concerning how much compensation an employer must pay a

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[13] The Court of Appeals based its decision in this case on the "injury in fact" element. Newport News Shipbuilding asserts that the second element of standing is also absent from this case. The Secretary, through the Director, contends he has been injured by an erroneous determination of the Board. The Board, however, is a quasi-judicial body within the Department of Labor, *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979). Its members are appointed by the Secretary, and the Board operates pursuant to a delegation of authority from the Secretary. 33 U.S.C. § 921(b)(1). This case thus presents a situation where one delegate of the Secretary is seeking redress from an administrative adjudication by another delegate of the Secretary. The Secretary is, in essence, seeking an advisory opinion. This is precisely the type of situation the standing doctrine is designed to avoid. *See* Section II, *infra*.

claimant. The Director is not injured in any manner by the Board's decision on this issue.

B. The Longshore Act Does Not Authorize The Director, On Behalf Of The Secretary Of Labor, To Seek Review Of Board Decisions Adjudicating Claims Between Private Parties. To The Contrary, The 1972 Longshore Amendments Made Clear Congress' Decision to Separate The Administrative Function From the Adjudicatory Process.

The Director asserts that she has standing to seek review of each and every Board decision rendered under the Act, irrespective of any injury to the Director's interests. *See Director, OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). Nothing in the language of the Act, however, authorizes the Secretary, or his delegate, the Director, to seek judicial review of Board decisions which simply adjudicate claims between private parties. Section 21(c) authorizes any "*person* adversely affected or aggrieved" by a Board order to seek judicial review of that decision. 33 U.S.C. § 921(c) (emphasis added). Neither the Secretary of Labor, nor the Director falls within this definition. *Compare* 33 U.S.C. §§ 902(1), (6).

The statutory framework created by the Act confirms that section 21(c) does not authorize the Director to seek review of Board decisions, at least where her administrative powers or Special Fund relief are not at issue. The Board is not outside the Executive Branch like an independent regulatory agency or tribunal. The Board is a quasi-judicial administrative body within the Department

of Labor. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979). The Secretary oversees the Board's functioning. 33 U.S.C. § 921(b)(1). The Board is organizationally located within the office of a Deputy Secretary of Labor, 20 C.F.R. § 801.103, and its members serve at the pleasure of the Secretary, 20 C.F.R. § 801.201. Thus, the Secretary may remove a Board member without cause. *Kalaris v. Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). There is no question but that the Board is an adjudicative body within the Department of Labor subject to the Secretary's oversight. The Director and the Board are thus both delegates of the Secretary. In this case, the Secretary, through the Director, is seeking review of an adjudication by an administrative body within the same agency he oversees. In essence, the Secretary is seeking an advisory opinion concerning competing views of the Act's provisions from within his own department. This is the very type of situation the standing doctrine is designed to avoid.[14]

The legislative history to the Longshore Act noted above confirms Congress never envisioned that the Secretary would appeal his own decision via his Benefits

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[14] The Director asserts that the Secretary promulgated regulations granting the Director standing to appear at all stages of the adjudication process, including before the Courts of Appeals. 20 C.F.R. §§ 802.201(a)(1), 802.410. This assertion is, however, irrelevant. An agency's power to promulgate regulations is no greater than the authority delegated by Congress. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Congress did not authorize universal standing for the Secretary or his delegate, and the Secretary cannot do so by regulation.

Review Board. Prior to 1972, such an appeal was impossible. Deputy Commissioners in the Department of Labor issued compensation orders and the only appeal available was to seek an injunction against the Deputy Commissioner. The Secretary would not seek an injunction against his own Deputy Commissioner. The 1972 Amendments were enacted to separate the Secretary's administrative function from the adjudicatory process. The Amendments were not intended to give the Secretary an advocate's role. The adjudicatory function was delegated by the Act itself to hearing examiners (Administrative Law Judges) and the Benefits Review Board. Congress, in the legislative history to the 1972 Amendments, criticized the prior system of combined administrative and adjudication processes. Congress created the Benefits Review Board to separate these two functions. *See* pages 8-10, *supra*.

C. The Director's Mere Status As Administrator Of The Longshore Act Does Not Make Her Adversely Affected Or Aggrieved By Every Board Decision. The Secretary Is A Neutral Administrator, And Is An Advocate For Neither Claimants Nor Employers.

Section 21(c) of the Act confers standing to obtain review of Board orders on persons "adversely affected or aggrieved" by such an order. 33 U.S.C. § 921(c). As the Court of Appeals noted below, this language codifies the first of the three minimum constitutional criteria for standing (Pet. App. at 9a n.1). The Director is not, however, "adversely affected or aggrieved" simply because

the Board rendered a decision on a portion of Harcum's claim with which the Director disagrees.[15]

The Director is charged with the responsibility of administering the Act. This administrative responsibility does not include claims adjudication. The Longshore Act clearly delegates that responsibility to hearing examiners (Administrative Law Judges) and the Board. Since the Director is not charged with any function in the adjudication of claims, it is difficult to see how her administrative role gives rise to standing in a case which does not involve an administrative issue.

Indeed, the Director in her brief apparently recognizes that responsibility for administrative duties does not give her standing in a pure compensation dispute between an employer and a claimant. The Director attempts to cure this defect by arguing that one of her duties is to maximize claimants' compensation. That is, the Director asserts she has an interest in ensuring "adequate compensation payments to claimants" (Director's Brief at 18). The Director contends that the Act "has many of the elements of social insurance," and thus, she has

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[15] This issue was raised before this Court before in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983). Perini contended that the Director did not have standing to seek review of a decision of the Second Circuit. The Director argued that her administrative responsibilities somehow conferred standing as an aggrieved party. It was not, however, necessary to resolve the question because the injured employee was present and filed briefs before the Court as well. In this claim, Harcum was not present before the Fourth Circuit and he is not present before this Court. Thus, the issue of the Director's standing under section 21(c) is directly before the Court.

some type of authority to ensure "that claimants receive the maximum benefits to which they are entitled" (Petition for Writ of Certiorari at 21). While it is no doubt true that the Director has at times taken this view, this Court has always recognized that the Act does not dictate such a result. Rather, this Court has recognized that the Act is a compromise workers' compensation system, to be administered as Congress drafted the program. *See, Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. at 282 ("like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers"); *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 2259 (1994) (Secretary's interpretation regarding allocation of burden of proof violates the Longshore Act and the APA). Indeed, at times the Director has recognized that her role is not as a claimants' advocate. In at least two cases decided by this Court, the Director has switched sides; while advocating a position favorable to the claimants before the Courts of Appeals, the Director changed positions and supported the employers before this Court. *See Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. at 628 n.4.

None of the decisions cited by the Director indicates that this Court has ever allowed standing to an individual or agency merely because the individual or agency has a general interest in a certain subject matter. The Director is the administrator of the workers' compensation program created by the Act. Thus, she has Article III standing to

appeal decisions dealing with her power to enforce compensation orders in United States District Courts. Similarly, she has Article III standing to appeal decisions dealing with her procedural rules for administering Longshore Act claims. Indeed, she arguably has Article III standing to appeal decisions on the jurisdictional scope of the Longshore Act, since such decisions define her administration. In addition, as the caretaker and protector of the Special Fund, the Director has Article III standing to appeal awards against the Special Fund. Nevertheless, when it comes to disputes between a claimant and an employer over how much compensation the claimant is due, the Director has no interest, and thus should have no standing.

In such compensation claims, the Director is much like a taxpayer in one of the taxation spending cases this Court has decided. While the Director, like a taxpayer, may be interested in the outcome, that vague interest is not enough to create standing – a concrete injury in fact and a personal stake in the outcome of the controversy are required. *See, e.g. Flast v. Cohen*, 392 U.S. at 99-101.

An administrator of claims should be neutral. The administrator's job is to assure the claim is tried before the adjudicative bodies Congress directed - Administrative Law Judges and the Benefits Review Board. Nowhere in the Longshore Act does the statute permit the Director to take sides. To the contrary, the 1972 Amendments to

the Longshore Act were designed to separate the administrative function and the adjudicatory function. *See* pages 8-10, *supra*.[16]

The Longshore Act simply has no role for the Director, one delegate of the Secretary of Labor, to challenge a decision of the Benefits Review Board, another delegate of the Secretary of Labor, when the issue is one solely between the claimant and employer. Numerous practical considerations show that Congress never intended to delegate such wide-ranging authority to the Director. First, the Act creates a typical workers' compensation framework in which the parties' pursue their own interests. The Act even provides for the direct payment of a successful claimant's attorney's fees and expenses by the worker's employer or insurance carrier. 33 U.S.C. § 928. As a result, there is no need for the Director to act as an advocate for claimants. The Act provides a mechanism

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[16] The Longshore Act does state that the Director can provide legal assistance to claimants. 33 U.S.C. § 939(c) Thus, assuming the Director can legally represent claimants, she could have standing if he appeared as counsel for a claimant. Of course, he would then have an obligation to that claimant to represent his or her interests. Indeed, this goes to the very heart of the standing issue. If one has a real injury in fact, one will act consistently to minimize the injury. When one has merely an "administrative" interest, one can change positions, depending on the administrative political viewpoint. This explains why the Director has twice changed his position from the Court of Appeals to this Court on major issues. *Estate of Cowart v. Nicklos Drilling Co.* ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 628 n.4 (1983). While an amicus or intervenor can do so, a party with standing should not be in a position to change sides; if he does, the Article III controversy is lost.

for the payment of injured workers' attorney's fees by employers, and thus, injured workers are perfectly capable of prosecuting their own claims.

Indeed, Harcum was represented in this case and was successful in obtaining all compensation he claimed with the exception of the differential between permanent partial and permanent total disability compensation between May 6, 1988 and February 16, 1989. Harcum was even successful in obtaining temporary total disability compensation from January 18, 1988 through May 6, 1988 because the Administrative Law Judge found that he had been given work beyond the scope of his medical restrictions. Harcum was awarded this total disability compensation *in addition* to his regular wages and additional pay for 48 hours of overtime worked (Pet. App. at 57a-59a). Harcum was ably represented and Newport News Shipbuilding is liable for his attorneys' fees. The notion that Harcum also needed the Director to successfully prosecute his claim has no basis in fact.

Second, it is not unusual for the Director's view of the correct statutory interpretation to change during the life of a claim. It has happened at least twice in cases decided before this Court. *See Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 628 n.4 (1983). The Director's contention that she has a cognizable interest in the development of uniform interpretation of the Act's provisions is questionable when her own office is unable to agree on such an interpretation. Moreover, it is unclear how the Director's ability to seek review of Board decisions will improve consistency, since review would be available in twelve different Courts of

Appeals. The Director's claimed interest in "consistency" is too tenuous to confer Article III standing, which requires an injury in fact.

Finally, and of critical importance, if the Director is free to insert herself into any contested claim, this may result in the Director taking positions which are in direct conflict with her pecuniary interest in protecting the assets of the Special Fund. The Treasurer of the United States is the custodian of the assets of the Special Fund, and the Director, as delegate of the Secretary, is its administrator. 33 U.S.C. § 944(a). As administrator of the Special Fund, the Director is obligated to protect its assets. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d at 114; *Director, OWCP v. Donzi Marine*, 586 F.2d at 379-80.

In the vast majority of cases in which the Director participates beyond the section 8(f) issue, she advocates a position which supports increased compensation liability, as she does in this case. In a case involving a claim for permanent disability benefits which also involves a claim by the employer to limit its liability to 104 weeks pursuant to section 8(f), such a position at least potentially increases the liability of the Special Fund. At the conclusion of the 104 week period of employer liability, the Special Fund becomes liable for the claimant's compensation. For example, an assertion by the Director that a particular claimant is entitled to greater weekly compensation payments increases the liability of the Special Fund. Such a situation presents a direct conflict of interest for the Director. Congress clearly did not intend such an anomalous result.

In its decision below, the Fourth Circuit noted another, but more attenuated, manner in which the Director's support of a claimant might adversely affect the Special Fund. The Court recognized that if an employer or insurer becomes insolvent, the Secretary has the discretion to make the employer's compensation payments from the Special Fund pursuant to 33 U.S.C. § 918(b). In the unlikely event such a situation occurred in this instance, the position advocated by the Director would increase the financial burden on the Special Fund (Pet. App. at 14a). The potential conflict of interest in either situation illustrates that Congress did not intend to authorize the Secretary or his delegate to seek review of Board decisions unless one of the Director's specifically delegated responsibilities or the assets of the Special Fund are impaired by the Board's decision.

D. The Enforcement Duties Conferred On The Director Are Extremely Narrow And Do Not Even Concern The Adjudication Of Contested Claims Between Covered Workers And Their Employers

The Director asserts that the Act confers broad enforcement duties on her, and that these enforcement duties somehow create a cognizable interest in the outcome of compensation claims. The enforcement responsibilities delegated to the Director, however, are extremely narrow and they have nothing whatsoever to do with contested compensation claims. More to the point, none of the Director's enforcement duties are even remotely involved in this case.

In fact, the *only* enforcement duty cited by the Director is the statutory authority, pursuant to 33 U.S.C. § 921(d), for District Directors to bring actions in United States District Courts to enforce compensation awards. This enforcement obligation only arises, however, when an employer fails to comply with a compensation order. *Id.* When a compensation order has been entered by a District Director pursuant to an agreement between the private parties or when a final compensation order has been entered in a contested case, the enforcement duty arises when the entity against whom the order is entered fails to pay the ordered compensation. Then, and only then, an action may be initiated in the appropriate District Court. This enforcement duty is clearly very limited.

While the Director has other limited enforcement obligations, they are not involved in this case. She is responsible for enforcing safety regulations promulgated under the Act. 33 U.S.C. § 941(b)(5). The Director is also responsible for certain enforcement activities with respect to assessments against self-insured employers and insurance carriers for payments into the Special Fund. *See* 33 U.S.C. § 944(d). That, however, is the extent of the Director's enforcement duties. The Director's enforcement authority is extremely narrow and specifically limited by the Act's language, and this limited duty cannot be the basis for universal standing. To the contrary, decisions interpreting Article III are clear on this point. The Director's standing exists only in those cases where the Director's administrative powers are at issue.

The Act established a traditional workers' compensation system in which private parties represent their own interests. Unlike the statutes involved in the cases cited

by the Director, the Longshore Act contains no central governmental enforcement mechanism. *See General Tel. Co. v. EEOC*, 446 U.S. 318 (1980) (Civil Rights Act of 1964 explicitly authorizes EEOC to file civil enforcement action); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690 (7th Cir. 1986) (Employee Retirement and Income Security Act explicitly authorizes Secretary to bring a civil action); *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1203-04 (5th Cir. 1981) (Fair Labor Standards Act explicitly authorizes Secretary to bring suits to recover unpaid minimum wages and overtime compensation and liquidated damages on behalf of employees named in a complaint). There is nothing in the Longshore Act that even suggests such a role for the Secretary or his delegate to adjudicate claims, except in the form of the Benefits Review Board.

E. The Legislative History And Decisions Interpreting The Black Lung Benefits Act Are Not Relevant In This Case Because That Statute, Unlike The Longshore Act, Explicitly Makes The Secretary Of Labor A Party To Every Claim, And Under The Black Lung Act, The Secretary Defends Against The Claim Or Is Involved In Determining The Responsible Operator

The Director's brief contains numerous citations to Title IV of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 901 *et seq.* (the "Black Lung Benefits Act" or "BLBA"). Although the BLBA does incorporate some provisions of the Longshore Act, the BLBA is irrelevant with respect to the issue before this Court, because under the BLBA, but not the Longshore Act, the

Director is explicitly given standing, and the Director represents the employer's interest in defending against a claim when no responsible operator can be identified, or the Director is involved in the determination of who is the responsible operator.

The BLBA explicitly provides that "[t]he Secretary [of Labor] shall be a party in any proceeding relative to a claim for benefits under this part." 30 U.S.C. § 932(k). Thus, the BLBA explicitly confers status as a party on the Director as delegate of the Secretary. If Congress had intended to grant the Director universal standing under the Longshore Act, it would have done so as it did under the BLBA. The fact that there is no comparable provision contained in the Longshore Act shows that the broad standing claimed by the Director was never intended by Congress.

Moreover, under the BLBA, if no responsible operator can be identified, which frequently is the case, and the Director questions the claimant's entitlement to benefits, *e.g.* whether he has pneumoconiosis, then the Director defends against the claim, in the same manner an employer/operator would. Often times the claimant is entitled to benefits, but there is a dispute as to who is the responsible operator. Compensation is then paid by the Black Lung Disability Trust Fund in the first instance. The Director then seeks to identify the responsible operator, who then is liable to repay the trust fund, which the Director administers. *See* 30 U.S.C. § 934(b); 20 C.F.R. §§ 725.420, 725.490, 725.522; *Helen Mining Co. v. Director, OWCP*, 924 F.2d 1269, 1271-1275 (3rd Cir. 1991).

Thus, the BLBA, its legislative history and decisions interpreting that statute are not relevant for two reasons. First, the BLBA explicitly makes the Secretary, and by delegation the Director, a party to every claim. The Longshore Act contains no comparable provision. Second, under the BLBA, the Black Lung Disability Trust Fund is primarily liable for miners' compensation in the majority of cases, and the Director administers that Fund. Under the Longshore Act, the responsible employer or insurance carrier is primarily liable for maritime workers' compensation.

Indeed, the very legislative history from the BLBA which the Director cites (Petitioner's Brief at 29) contradicts the Director's argument. While the Senate report noted that body's assumption that adoption of the Longshore Act procedures gave the Director standing (which might well be true under BLBA because the Director stands in the employer's shoes or is involved in determining the responsible operator), the Senate ultimately recognized that its belief was wrong. Thus, pursuant to that report, it enacted a provision conferring standing on the Director under the BLBA. The Longshore Act has no comparable provision.

II. THE DIRECTOR DOES NOT HAVE ARTICLE III STANDING BECAUSE THIS CASE INVOLVES ONE DELEGATE OF THE SECRETARY OF LABOR SEEKING REVIEW OF AN ADMINISTRATIVE ADJUDICATION BY ANOTHER DELEGATE OF THE SECRETARY

In order to satisfy Article III standing, the party asserting standing must establish not only an injury in fact, but also a causal connection between the injury and

the conduct of the opposing party. The causal connection required by the second Constitutional criterion for standing is absent in this case. With respect to the causation criterion, this Court noted in *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2136, that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' " *Id. quoting, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The action the Director is actually challenging is the Board's decision that Harcum was only partially disabled between May 6, 1988 and February 16, 1989.

The Director is a delegate of the Secretary of Labor. 20 C.F.R. §§ 701.201, 701.202(a). The Board is also a delegate of the Secretary. 33 U.S.C. § 921(b)(1). For organizational purposes, the Board falls under a Deputy Secretary of Labor. 20 C.F.R. § 801.103. Its members are appointed by the Secretary and serve at his pleasure. 20 C.F.R. § 801.201. Board members may be removed by the Secretary even without cause. *Kalaris v. Donovan*, 697 F.2d 389-97. The Board is a quasi-judicial body, but it is a part of the Department of Labor. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d at 1314 n.7.

Since the Board and the Director are both delegates of the Secretary of Labor, the Secretary is, in essence, seeking an advisory opinion from the Court of Appeals to resolve a dispute concerning competing interpretations of the Act between two entities within his own department. While the interpretation of the Act rendered by the Board was asserted by Newport News Shipbuilding, the Board's decision is still an adjudication by an administrative body within the Department of Labor. The Secretary, through

the Director, is seeking review of an administrative adjudication by an entity within the very department he oversees. The injury complained of in this case is not attributable to the Respondent, Newport News Shipbuilding. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Thus, there is no justiciable controversy and Article III standing does not exist.

III. SECTION 21(c) OF THE LONGSHORE ACT DOES NOT CONFER STANDING ON THE DIRECTOR

Section 21(c) of the Longshore Act allows a "person" to appeal a Board decision to the Benefits Review Board. 33 U.S.C. § 921(c). While the Secretary is defined in section 2(6) of the Act, 33 U.S.C. § 902(6), he is not explicitly included in the section 2(1) definition of a person: "the term 'person' means individual, partnership, corporation or association." 33 U.S.C. § 902(1).

While the Director will no doubt argue that this omission was an oversight, the legislative history indicates that it was intentional. As noted above, before 1972, the Secretary could not appeal a decision of his own Deputy Commissioners, since the only appeal process was an injunction against enforcement of the Deputy Commissioner's decision. In enacting the 1972 Amendments, Congress gave no indication it intended to create an advocate's role for the Secretary. Rather, Congress wanted the Secretary's administrative role and adjudication role separated. The latter role was legislatively given to the Benefits Review Board. *See* pages 8-10, *supra*.

This Court has repeatedly directed that the Longshore Act should be enforced as written. *Potomac Elec. Power Co. v. Director*, 449 U.S. 268, 281 (1980); *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1994). Section 21(c), as written and as shown by the legislative history, does not allow the Director, a delegate of the Secretary of Labor, to appeal a decision of the Benefits Review Board, another delegate of the Secretary of Labor.

The Fourth Circuit, in the decision below, did not, of course, have to reach the issue of the definition of a "person" in section 21(c). Rather, the Fourth Circuit found that the Director was not affected or aggrieved, as is also required by section 21(c) of the Act. Because the Director's administrative powers and Special Fund responsibilities were not implicated in the Board's decision to limit Harcum's compensation to a partial disability award in this case, the Fourth Circuit's ruling is clearly correct.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS

The United States Constitution provides in relevant part:

ARTICLE III – THE JUDICIARY

* * *

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C. § 901 *et seq.*, provides in relevant part:

§ 902. Definitions

When used in this chapter –

> (1) The term "person" means individual, partnership, corporation, or association.
>
> * * *
>
> (6) The term "Secretary" means the Secretary of Labor